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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

8 GAYLEN BROWN,

9 Plaintiff,

10 v.

11 BNSF RAILWAY COMPANY, f/k/a
12 Burlington Northern and Santa Fe Railway
Company,

13 Defendant.

CASE NO. C19-746RSM

ORDER GRANTING IN PART
DEFENDANT’S MOTION TO COMPEL

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15 This matter is before the Court on Defendant’s Motion to Compel, or in the Alternative,
16 Renewal of Request for a Modified Scheduling Order. Dkt. #12. Defendant was forced to file
17 this Motion seeking responses to Defendant BNSF Railway Company’s First Combined
18 Interrogatories and Requests for Production to Plaintiff. Alternatively, Defendant requests that
19 the Court require early and phased discovery as to Plaintiff’s experts. *Id.* at 3–4. Plaintiff has
20 subsequently responded to Defendant’s discovery requests. Dkt. #13 at 1–2. Despite receiving
21 responses, Defendant maintains that the responses “lacked substantive content” and does not
22 withdraw its Motion. The Court grants the Motion in part.

23 Plaintiff worked for Defendant and its predecessor for almost 20 years. Dkt. #1 at ¶ 6.
24 Following his employment, Plaintiff developed bladder cancer that he alleges was caused by his

1 exposure to “diesel fuel/fumes/exhaust, benzene, creosote, herbicides[,] and asbestos dust and
2 fibers” in the course of his employment. *Id.* at ¶¶ 7–11. Defendant’s central concern is that
3 Plaintiff’s Complaint does not “allege that any of the substances are known to cause bladder
4 cancer.” Dkt. #12 at 3. Defendant asserts that Plaintiff will ultimately have to “prove that a
5 specific substance causes the type of cancer at issue in the lawsuit.” *Id.* (citing *Henricksen v.*
6 *Conoco Phillips Co.*, 605 F. Supp. 2d 1142 (E.D. Wash. 2009). Defendant thus argues that its
7 discovery is aimed at “narrowing the issues” and that phasing discovery as to experts can remove
8 claims that will not ultimately proceed. Dkt. #12 at 3–4.

9 Plaintiff has not opposed Defendant’s Motion, filing only an untimely response. *See* Dkt.
10 #15. Plaintiff provides no explanation for the untimely filing and the Court will not consider it.
11 To the extent necessary, the Court denies Plaintiff’s request for leave to file an untimely response.
12 The Court takes Plaintiff’s failure to respond as an admission that Defendant’s Motion has merit.”
13 *See* LCR 7(b)(2) (“Except for motions for summary judgment, if a party fails to file papers in
14 opposition to a motion, such failure may be considered by the court as an admission that the
15 motion has merit.”). The Court therefore considers what relief is appropriate.

16 The Court will not grant Defendant’s alternative request that the Court modify the
17 scheduling order to phase discovery. Specifically, Defendant requests that Plaintiff be required
18 to present, within 30 days, an affidavit of a qualified expert identifying (1) each specific
19 substance Plaintiff claims caused his cancer, (2) an expert who will testify as to each substance,
20 and (3) the supporting scientific and medical literature. *See* Dkt. #12-3 (Defendant’s proposed
21 order). On this record, the Court does not find good cause for departing from the normal course
22 of discovery or its scheduling order. Additionally, to the extent Defendant points to the
23 possibility of future harm absent its requested relief, Defendant is protected under the applicable
24 rules and can raise the issue with the Court when appropriate.

1 The Court does, however, find that Plaintiff's discovery responses are insufficient and
2 non-responsive. *See e.g.* Dkt. #13-1 at 3.

3 **INTERROGATORY NO. 3:** With respect to creosote please identify:

- 4 (a) Who told you that your cancer was caused by creosote;
- 5 (b) For each individual, please state when it occurred;
- 6 (c) For each individual, please state whether that individual is an expert witness as
defined by Federal Rule of Evidence 702 and if so, in what field;
- 7 (d) Identify the scientific and medical authorities that support a causal link between
8 creosote and your cancer;
- 9 (e) Identify all witnesses and all documents that you contend established
10 evidentiary support for your factual contention that creosote caused your
cancer.

11 **ANSWER:** Plaintiff will respond in way of expert testimony.

12 Accordingly, the Court finds that Defendant's Motion should be granted to the extent it seeks
13 substantive and complete responses to Defendant's discovery requests.

14 Having reviewed Defendant's Motion and the remainder of the record, the Court finds
15 and ORDERS that Defendant's Motion to Compel, or in the Alternative, Renewal of Request for
16 a Modified Scheduling Order (Dkt. #12) is GRANTED IN PART. **Within five (5) days of this**
17 **Order**, Plaintiff shall supplement his responses to Defendant BNSF Railway Company's First
18 Combined Interrogatories and Requests for Production to Plaintiff to provide substantive and
19 complete responses to each request. Plaintiff may not raise new objections.

20 DATED this 4 day of November 2019.

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22 RICARDO S. MARTINEZ
23 CHIEF UNITED STATES DISTRICT JUDGE
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